Andre Ravindran S Arul v Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj

HIGH COURT (KUALA LUMPUR) CIVIL SUIT NO S2–22–621 OF 2001
JAMES FOONG J
23 APRIL 2004

Civil Procedure — Writ of summons — Renewal — Extension of time — Whether application for extension to be made before or after expiry of writ — Interpretation Acts 1948 & 1967 s 45

Civil Procedure — Writ of summons — Service — Delay in service — Whether in contravention of O 6 r 7(2) Rules of the High Court 1980 — Whether reasons for delay justified — Test for — Whether action filed in form of a protective writ

Statutory Interpretation — Subordinate legislation — Validity — Whether O 6 r 7(2A) of Rules of the High Court 1980 inconsistent with s 45 of Interpretation Acts 1948 & 1967 — Effect of inconsistency — Interpretation Acts 1948 & 1967 s 23

The plaintiff had provided consultancy services to the defendant. When the latter failed to pay his fees, the plaintiff commenced an action for damages for the moneys due by filing a writ of summons on 13 July 2001 but the senior assistant registrar, who witnessed this document, inserted the date as 14 July 2001. However, no attempts to serve this writ on the defendant. On 24 January 2002, the plaintiff's application to extend this writ was allowed and took effect from 14 January 2002 to 13 July 2002. Yet again, the said writ was not served. On 26 July 2002 the plaintiff applied to extend the writ for the second time. It was also allowed and the writ was extended from 14 July 2002 to 13January 2003, and subsequently served on the defendant on 10 January 2003. The defendant applied to set aside the various orders, the writ, and the service of the writ on the following grounds, namely (i) the plaintiff's applications for extension of the life of the writ were made after the writ has expired and therefore contravened O 6 r 7(2A) of the Rules of the High Court 1980 ('RHC'); (ii) that the extension orders did not continue from the expiry date of the writ; and (iii) the plaintiff did not to attempt to serve the writ on the defendant before it expired and this contradicted O 6 r 7(2) RHC. The deputy registrar allowed the defendant's application based on the above-mentioned grounds. Dissatisfied, the plaintiff appealed.

Held, allowing the appeal:

(1) The plaintiff's application for extension of the writ could be made after expiry of the writ by virtue s 45 of the Act. Whilst this is inconsistent with O 6 r 7(2A) RHC which requires an application for an extension to be made before expiry of the writ, s 23(1) of the Act renders a subsidiary legislation (of which the RHC is made under such an Enactment) containing inconsistent provisions to be void (see para 15).

(2) The defendant had misconstrued the date of the issuance of the writ as being 13 July 2001. Whilst it was undisputed that the said document was filed on 13 July 2001, but the date of issuance must follow the date

when it was witnessed by the senior assistant registrar and signed by her as provided in Form 2 of the RHC. And the senior assistant registrar did so on 14 July 2001 as otherwise this document has no legal effect. Thus, the writ took effect from 14 July 2001, and not on 13 July 2001. Accordingly, the expiry date fell on 13 January 2002, and the extension to commence from the 14 January 2002 would be in order since there was no break from the expiry date (see para 18).

(3) Even if the expiry date of the writ is 12 January 2002 (by accepting the writ being issued on 13 July 2001) and the extension only commenced from 14 January 2002, such order for extension would still not be void by reason that an application for extension can be made after the expiry date of the writ. If it is made after the expiry date of the writ then the theory of the life of the writ must not extinguish at any one time is a fallacy since when such application is made the life of the writ has already expired. Thus if such extension was to commence it would still begin, in reality, from a date after the writ had expired. If at all it was stated to commence immediately after the expiry date it would be a matter of backdating. Accordingly, there was no necessity to state a date immediately following the expiry date of the writ. As long as the extended date is listed as to when it commences and terminates then the extension order is good, and here such endorsement existed (see para 19).

(4) The test to be applied for consideration for extension of the writ is "where the court is satisfied that good reasons appear to excuse the delay in service" (see para 21) (*Mayban Finance Bhd v Umas Sdn Bhd & Anor* [2002] 4 MLJ 276 followed).

(5) The plaintiff's delay in serving the writ was justified. He had commenced a parallel action on the same subject matter against the defendant in the Singapore courts in which the defendant had raised a preliminary issue of *forum non conveniens*. Whilst that suit was being heard, the plaintiff had filed this action as a protective writ, to preserve his cause of action in the event the ruling favoured the defendant, thereby necessitating him to litigate in Malaysia. Therefore he had correctly withheld service so as to avoid duplicity of action, and, instead, continued to extend the life of the writ until the Singapore Court of Appeal decided against him on the issue mentioned. Once that was decided, the plaintiff served this writ on the defendant (see para 22).

[**Bahasa Malaysia summary**

Plaintif telah memberikan perkhidmatan pakar runding kepada defendan. Bila defendan gagal untuk membayar yurannya, plaintif memulakan tindakan untuk ganti rugi untuk bayarannya dengan memfailkan writ saman pada 13Julai 2001 akan tetapi, penolong kanan pendaftar, yang menjadi saksi kepada dokumen ini meletakkan tarikhnya sebagai 14 Julai 2001. Walau bagaimanapun, tiada percubaan dibuat untuk menyampaikan writ tersebut kepada defendan. Pada 24 Januari 2002, permohonan plaintif untuk melanjutkan tarikh pelaksanaan writ tersebut dibenarkan dan ianya berkuatkuasa dari

14Januari 2002 ke 13 Julai 2002. Sekali lagi, writ tersebut tidak disampaikan. Pada 26 Julai 2002 plaintif memohon untuk melanjutkan tempoh writ untuk kali kedua. Ia dibenarkan dan tempoh writ tersebut dilanjutkan dari 14 Julai ke 13 Januari 2003, dan seterusnya diserahkan kepada defendan pada 10 Januari 2003. Defendan memohon untuk mengetepikan beberapa perintah, writ, dan penyampaian writ berdasarkan hujah-hujah berikut, iaitu (i) permohonan plaintif untuk melanjutkan tempoh hayat writ dilakukan selepas writ tamat dan ini melanggar kehendak A 6 k 7(2A) Kaedah-kaedah Mahkamah Tinggi ('KMT'); (ii) bahawa perintah lanjutan tidak bersambung dari tarikh habis tempoh writ tersebut; dan (iii) plaintif gagal untuk berusaha menyampaikan writ kepada defendan sebelum tamat tempoh dan ini bertentangan dengan A 6 k 7(2) KMT. Berdasarkan alaan-alasan di atas, timbalan pendaftar telah membenarkan permohonan defendan. Plaintif membuat rayuan ini kerana tidak bersetuju dengan keputusan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Permohonan plaintif untuk melanjutkan writ boleh dibuat selepas habis tempoh writ tersebut di bawah s 45 Akta Interpretasi 1948 & 1967 ('Akta'). Sementara ini tidak konsisten dengan peruntukan A 6 k 7(2A) KMT, s 23 Akta menyebabkan suatu perundangan subsidiari (yang mana KMT terwujud di bawah Enakmen sedemikian) yang mengandungi peruntukkan yang tidak konsisten sebagai tak sah. (lihat perenggan 15).

(2) Defendan telah menyalahtafsirkan tarikh writ dikeluarkan sebagai 13Julai 2001. Walaupun tidak dipertikaikan bahawa dokumen tersebut difailkan pada 13 Julai 2001, tetapi tarikh pengeluaran semestinya mengikut tarikh yang disaksikan oleh penolong kanan pendaftar dan ditandatangani oleh beliau seperti yang disediakan dalam Borang 2 KMT. Dan, penolong kanan pendaftar telah berbuat demikian pada 14 Julai 2001. Jika sebaliknya, dokumen ini tidak mempunyai kuatkuasa undang-undang. Oleh itu, tarikh writ berkuatkuasa adalah dari 14 Julai 2001, dan bukan pada 13 Julai 2001. Maka dengan itu, habis tempoh tarikh jatuh pada 13 Januari 2002, dan susulan ini lanjutan bermula dari 14 Januari 2002 kerana ia tidak terputus dari tarikh tempoh tamat (lihat perenggan 18).

(3) Jika pun habis tempoh tarikh writ adalah pada 12 Januari 2002 (sambil menerima bahawa writ dikeluarkan pada 13 Julai 2001) dan lanjutan hanya bermula dari 14 Januari 2002, perintah sedemikian untuk lanjutan masih belum terbatal kerana sesuatu permohonan untuk lanjutan boleh dibuat selepas habis tempoh tarikh writ. Jika ia dibuat selepas habis tempoh tarikh writ tersebut, maka teori tempoh hayat writ mesti tidak boleh terluput pada segenap masa adalah salah anggapan bila permohonan seperti itu dibuat tempoh hayat writ tersebut sudah berakhir. Oleh itu, jika lanjutan sedemikian untuk bermula ia akan dimulakan, pada hakikatnya, dari tarikh selepas writ telah habis tempohnya. Jika dinyatakan untuk bermula dengan segera selepas habis tempoh tarikh itu ia akan melibatkan pengunduran tarikh. Sewajarnya, tidak ada keperluan untuk menyatakan tarikh dengan segera berikutan habis tempoh tarikh writ. Selagi tarikh lanjutan telah disenaraikan bila ia bermula dan berakhir

ketika itu perintah lanjutan adalah sempurna dan di sini pengendorsan sedemikian didapati wujud (lihat perenggan 19).

(4) Ujian untuk digunakan untuk pertimbangan tempoh lanjutan writ adalah 'where the court is satisfied that good reasons appear to excuse the delay in service' (lihat perenggan 21) (*Mayban Finance Bhd v Umas Sdn Bhd & Anor* [2002] 4 MLJ 276 diikut).

(5) Kelewatan plaintif untuk menyerahkan writ mempunyai justifikasi. Dia telah memulakan tindakan selari mengenai subjek yang sama terhadap defendan di mahkamah Singapura di mana defendan telah membangkitkan isu permulaan *forum non conveniens.* Sementara guaman tersebut dibicarakan, plaintif memfailkan tindakan ini sebagai satu writ lindungan untuk mengekalkan kausa tindakan sekiranya keputusan mahkamah tersebut memihak kepada defendan, dengan itu memerlukannya membuat litigasi di Malaysia. Oleh itu, beliau sememangnya betul dalam keengganannya membuat penyerahan untuk mengelakkan kependuaan tindakan, tetapi sebaliknya terus memohon untuk melanjutkan tempoh hayat writ sehingga Mahkamah Rayuan Singapura membuat keputusan terhadap beliau atas isu yang disebutkan. Selepas isu berkenaan diputuskan, plaintif telah menyerahkan writ tersebut kepada defendan (lihat perenggan 22).]

Notes

For cases on extension of writ of summons, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 6578

For cases on renewal of writ of summons, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6603–6617

For cases on validity of subordinate legislation, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1697–1970

For writ of summons see 1 *Halsbury's Laws of Malaysia* (2002 Reissue), para 10.2–004

Cases referred to

Battersby & Ors v Anglo-American Oil Co Ltd & Ors [1945] 1 KB 23 (refd)
Mayban Finance Bhd v Umas Sdn Bhd & Anor [2002] 4 MLJ 276 (folld)
The Goldean Mariner [1990] 2 Lloyd's Rep 218 (refd)

Legislation referred to

Interpretation Acts 1948 & 1967 ss 23(1), 45
Rules of the High Court 1980 O 6 r 7, (2), (2A), Form 2

Jeffery Wong (M/s Jeffery Wong & Lim) for the plaintiff
Yusuf Khan (Mathew Thomas & Leney Albert with him) (M/s Abdul Raman Saad & Associates) for the defendant

James Foong J:

INTRODUCTION

[1] Enclosure 29 is an appeal by the plaintiff against the decision of the learned deputy registrar who allowed the defendant's application (in encl 23) to: (a) set aside two *ex parte* orders granted by this court dated 26 March 2002 and 26 July 2002 respectively to extend the writ of summons in this case; (b) the writ of summons itself; and (c) the service of the writ of summons.

BACKGROUND

[2] The plaintiff filed this suit claiming damages from the defendant in failing to pay consultancy services undertaken by the plaintiff to the defendant.

[3] The writ of summons was filed on 13 July 2001 but the date inserted by the senior assistant registrar, and who witnessed this document, is 14 July 2001.

[4] If one considers the date of issuance of the writ as 13 July 2001 then the six-month expiry date of this writ would be 12 January 2002. But if 14July 2001 is accepted as the date of issuance then the writ would expire on 13 January 2002.

[5] There was no attempt to serve this writ on the defendant. On 24 January 2002, the plaintiff applied to extend this writ. It was allowed on 26 March 2002. The first extension ('1st extension') order states that the writ is extended from 14 January 2002 to 13 July 2002.

[6] Despite this extension, no steps were taken by the plaintiff to serve the writ on the defendant. On 26 July 2002 the plaintiff made a second application to extend the writ. It was allowed and the writ was extended from 14 July 2002 to 13 January 2003.

[7] On 10 January 2003 the writ was served on the defendant.

[8] Without haste the defendant filed conditional appearance and applied in encl 23 to set aside the various orders, the writ, and the service of the writ as disclosed above. The deputy registrar, after hearing arguments allowed this application. Thus, this appeal.

GROUNDS ADVANCED BY THE DEFENDANT IN SUPPORT OF ENCL 23

[9] The applications by the plaintiff for extension of the life of the writ were made out of time ie after the writ has expired. This runs contrary to O6 r 7(2A) of the Rules of the High Court 1980 ('RHC'), which demands that such applications must be made before the expiry of the writ.

[10] The extension orders for the writ are all void *ex debito justitae* since the commence date for the extension begins from a new date rather than the continuation from the last date before the writ expired.

[11] The plaintiff did not make any attempt to serve the writ on the defendant before it expired. This contradicts O 6 r 7(2) RHC that requires the plaintiff to make efforts to serve the writ before making an application for extension of the writ.

ANALYSIS

First ground: Application for extension made out of time

[12] On the first ground challenging the plaintiff's for making the applications for extension after the writ has expired thereby contravening O 6 r 7(2A) RHC, the plaintiff counters this with s 45 of the Interpretation Acts 1948 & 1967 which provides:

> Construction of power to extend time
>
> Where in any written law a time is prescribed for doing any act or taking any proceedings and power is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the application for its exercise is not made until after the expiration of the time.

[13] Reading this together with s 23(1) of the same Act:

> Avoidance of subsidiary legislation in case of inconsistency with Act
>
> (1) Any subsidiary legislation which is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

[14] The plaintiff contends that his application for extension of the writ can be made after expiry of the writ.

[15] I agree with this proposition. Though O 6 r 7(2A) RHC requires application for such extension to be made before expiry of the writ but it runs contrary to s 45 of the Interpretation Act that allows such application to be made after the expiration of the prescribed time. And since s 23(1) of the Interpretation Act declares a subsidiary legislation (of which the RHC is made under such an Enactment) containing inconsistent provision to be void then s 45 of the Interpretation Act must prevail over O 6 r 7(2A) RHC. With these, I find that the defendant's first contention cannot sustain.

Second ground: Extension orders did not continue from the expiry date of the writ

[16] The defendant's second ground of complaint is: the first extension order commenced from a date, which is a day after the expiry of the writ. According to the defendant's calculation the writ first expired on 12 January 2002. This is based on the commencement date at 13 July 2001. The first extension order states that the writ is extended to commence from 14 January 2001 to 13 July 2002. This leaves a gap of one day where the writ has expired. When the writ has expired then it cannot recommence on a date which is not immediately after the expiry date. It must start immediately after the expiry date of the writ otherwise there is a break in the life of the writ. Since there is such defect in the extension order, such order and the one made subsequently are void *ex debito justitae*.

[17] This argument is flawed in two aspects. A

[18] The first is the wrong perception that the date of the issuance of the writ is 13 July 2001. There is no dispute that this document was filed on 13July 2001 but the date of issuance must follow the date when it was witnessed by the senior assistant registrar and signed by her as a representative of the Chief Judge who commands the defendant to enter appearance when B the writ is served otherwise judgment will be entered against him. This is provided in Form 2 of the RHC. And the senior assistant registrar did this on 14 July 2001. Without the senior assistant registrar acting as a witness and signing on the writ, this document has no legal effect. Thus, the writ in my view is only effective from 14 July 2001 and not on 13 July 2001. When it commenced on 14 July 2001 then the expiry date fell on 13 January 2002 C and the extension to commence from the 14 January 2002 would be in order since there is no break from the expiry date.

[19] Even if the expiry date of the writ is 12 January 2002 (by accepting the writ being issued on 13 July 2001) and the extension only commenced from 14 January 2002, such order for extension would still not be void by D reason that an application for extension can be made after the expiry date of the writ. If it is made after the expiry date of the writ then the theory of the life of the writ must not extinguish at any one time is a fallacy since when such application is made the life of the writ has already expired. Thus if such extension is to commence it would still begin, in reality, from a date after the writ had expired. If at all it is stated to commence immediately after the E expiry date it would be a matter of backdating. Thus, I find that there is no necessity to state a date immediately following the expiry date of the writ. As long as the extended date is listed as to when it commences and terminates then the extension order is good, and in this case such endorsement exists.

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Third ground: No attempts were made by the plaintiff to serve the writ to qualify for consideration for extension

[20] The third accusation levied on the plaintiff is that since the plaintiff made no attempts to serve this writ then he has failed to comply with the pre-requisite set out in O 6 r 7(2) RHC requiring the plaintiff to make efforts G to serve this writ and such service has been unsuccessful before his application can be considered.

[21] The principle applicable in respect of this issue is extensively considered by Justice Clement Skinner in *Mayban Finance Bhd v Umas Sdn Bhd & Anor* [2002] 4 MLJ 276 @ 287. I agree with the learned judge's view that the test to be applied for consideration for extension of the writ is "where the court H is satisfied that good reasons appear to excuse the delay in service" (see Lord Goddard in *Battersby & Ors v Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23 @ 32) rather than basing it on the mere fact that there is no attempt to serve the writ before the application for extension is made.

[22] In this case I find there is sufficient reason to justify the plaintiffs non- I action in the service of the writ. There was a parallel action commenced in the Singapore High Court by the plaintiff against the defendant on the same

subject matter. But the defendant had raised a preliminary issue of *forum non conveniens*. While the Singapore courts were considering this matter, the plaintiff filed this action as a protective writ, to preserve the plaintiff's cause of action in the event the Singapore courts rule in favour of the defendant and require the plaintiff to litigate in Malaysia. The filing of such protective writ is allowed by law — see *The Goldean Mariner* [1990] 2 Lloyd's Rep 218 @ 219. For this reason the plaintiff withheld service so as to avoid duplicity of action, and, instead, continued to extend the life of the writ until the Singapore Court of Appeal decided against him on the issue mentioned. Once that was decided, the plaintiff served this writ on the defendant. This, I consider as good reason for the delay in the service of the writ leading to there being no flaw in the extension orders of the writ.

CONCLUSION

[23] Accordingly, I hereby allow this appeal with costs in the cause.

Plaintiff's appeal allowed with costs in the cause.

Reported by M Maheswaran